IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

PATRICIA DEERY, Appellant/Claimant,	)	
v.	)	C.A. No.: 09A-10-012 FSS
ASTRAZENECA, Appellee/Employer.	)	

Submitted: December 1, 2009
Decided: March 23, 2010

ORDER

Upon Employee's Appeal From the Industrial Accident Board – *AFFIRMED*

SILVERMAN, J.

1. The issue in this appeal is whether the Industrial Accident Board erred by denying $520.33 in medical expenses and limiting the attorneys' fee award to $2,541.29. For the reasons set out below, the Board's decision is affirmed.

2. Patricia Deery worked for AstraZeneca for approximately seventeen years. In 2001, Deery was transferred to a new department under a different supervisor, and Deery was promoted to administrative manager. Following her transfer, Deery took work home almost every night and worked on weekends when required. Deery estimated that she worked sixty to seventy hours per week. According to Deery, after the transfer, her interactions with her supervisor became stressful. The Board found that the supervisor was overbearing and abusive in several ways. Accordingly, Deery began to feel depressed, overwhelmed, and had trouble sleeping and breathing. She also had stomach cramps, back pain, and daily headaches.

3. In September 2002, Deery began to see Darlene Annas, APRN-BC, a board certified psychiatric nurse-counselor. Deery was diagnosed with major depressive disorder, recurrent and generalized anxiety disorder. Annas concluded that Deery's psychological problems were a reaction to her work environment. Specifically, Annas "perceived a direct causal relationship between anxiety and the supervisor's relationship with Claimant." Deery was also diagnosed with attention

deficit disorder, which "is chronic. . . . [it is] from when you were born."

4. Dr. Mark J. Corso, board certified in gastroenterology and internal medicine, examined Deery in 2003 and diagnosed her with irritable bowel syndrome. Dr. Corso "believed that the IBS was related to Claimant's stressful work environment." Deery was eventually prescribed medication for pain, anxiety, depression, inability to sleep, and irritable bowel syndrome. In December 2003, Deery took a leave of absence. While on leave, her stress and anxiety decreased.

5. In March 2004, Deery saw Maladdin Milic, Ph.D., a clinical psychologist. Dr. Milic observed "symptoms of depressed mood, guilt, anxiety, panic attacks, impulsiveness, worthlessness, irritability, obsessions, compulsions, poor memory, concentration and sleep disturbance." Dr. Milic "related these symptoms to work-related stress."

6. Deery took another leave of absence in February 2005. Dr. Milic wrote a formal letter to AstraZeneca describing Deery's disorders and her interaction with her supervisor, recommending that Deery be transferred. On February 28, 2005, Annas recommended a job transfer, supporting a change in supervisor. Deery returned to work in April 2005, but she went on leave again in May. In July 2005, Deery was referred to MeadowWood Behavioral Health System, where she was an

outpatient. She was discharged on August 10, 2005, and returned to work on August 22.

7. In September 2005, Deery was assigned to a new supervisor, but went on leave in November. In December, she was transferred to a new position at AstraZeneca. When Dr. Milic saw Deery again in February 2006, her conditions had improved, and Dr. Milic "related that to the change in position at work."

8. On September 8, 2005, Deery filed a successful petition to determine compensation due, alleging that she was injured while working at AstraZeneca. Deery claimed that her injuries were caused by stress at work. AstraZeneca, however, contended that Deery's injuries were caused by stress in her personal life.

9. Board hearings were held on April 12, 2006 and October 24, 2006. Deery presented deposition testimony of Drs. Corso and Milic, and Annas. Dr. Wolfram Rieger, a board certified psychiatrist, testified by deposition on AstraZeneca's behalf.

10. In a written opinion, the Board granted Deery's request for benefits. Specifically, the Board found the testimony of Deery's experts more persuasive and found Deery credible. The Board also found that Deery's testimony was supported by other AstraZeneca employees' testimony. The Board found the

testimony of AstraZeneca's medical expert "unpersuasive" and the supervisor not credible. In sum, the Board concluded that "Claimant has provided objective evidence that 'her work conditions were actually stressful and that such conditions were a substantial cause of claimant's medical disorder.'"[1] The Board found that there was "substantial evidence of stressful work conditions causing psychological injury." Those findings are not challenged here.

11. Additionally, the Board found total disability from February 1, 2005 to April 25, 2005, at the compensation rate of $506.81 per week. The Board also concluded that Deery was entitled to receive medical witness fees under 19 *Del. C.* § 2322(e), as well as attorneys' fees under 19 *Del. C.* § 2320. The Board considered the *General Motors Corp. v. Cox*[2] factors, and found that an attorneys' "fee of $10,000 (40 x $250.00) or thirty percent . . . of the award, whichever is less, is reasonable."

12. On May 23, 2007, Deery filed a motion for reargument, "seeking an amendment to the Board's award to include [$520.33 in] medical expenses and an additional period of total disability." Deery contended that the medical bills were supported by expert medical testimony, but the Board found that she "did not

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[1] *See State v. Cephas*, 637 A.2d 20, 27 (Del. 1994).

[2] 304 A.2d 55, 57 (Del. 1973).

reference the testimony that did so." While the Board noted that "Dr. Milic's testimony indicat[ed] his treatment was reasonable, necessary, and related to Claimant's psychological injury[,]" the Board found that Dr. Milic's testimony did "not appear to support the documents that are included in the medical expenses, consisting of prescription, mileage and parking." Finding no testimony that supported the medical expenses, the Board denied Deery's motion.

13. Furthermore, while Deery argued that the additional period of total disability, from July 25, 2005 to September 19, 2005, was supported by expert medical testimony, the Board found that Deery "made no reference to the medical expert testimony supporting that period." The Board concluded that "[t]he evidence, as presented, does not support a finding of total disability during the period in question."

14. On May 23, 2007, AstraZeneca also filed a motion for reargument seeking clarification of the attorneys' fee award. The Board granted AstraZeneca's motion, finding that Deery was entitled to $2,541.29 in attorneys' fees, which is thirty percent of the amount awarded. Deery subsequently filed this appeal.

15. When analyzing an appeal from the Board, the Superior Court must "determine whether the Board's decision is supported by substantial evidence

and is free from legal error."[3] The court "does not sit as a trier of fact with authority to weigh the evidence, determine questions of credibility, and make its own factual findings and conclusions."[4] Questions of law are reviewed *de novo*.[5] "Absent errors of law, however, the standard of appellate review of the [Board's] decision is abuse of discretion."[6]

16. First, Deery contends that "[t]he Board's decision to deny Claimant's request for medical expenses was improper and not supported by the evidence." The $520.33 includes "mileage expenses to attend the defense medical examination of Dr. Rieger, and a parking bill associated with that defense medical exam."

17. Under 19 *Del. C.* § 2343, "[a]fter an injury, . . . the employee, if so requested by the employee's employer . . . shall submit the employee's own self for examination . . . to a physician legally authorized to practice the physician's

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[3] *Vincent v. E. Shore Mkts.*, 970 A.2d 160, 163 (Del. 2009); *see also Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994) ("'Substantial evidence' means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.").

[4] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

[5] *Glanden v. Land Prep, Inc.*, 918 A.2d 1098, 1101 (Del. 2007).

[6] *Id.*; *see also Person-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del. 2009) ("The Board has abused its discretion only when its decision has 'exceeded the bounds of reason in view of the circumstances.'").

profession . . . who shall be selected and paid by the employer." The statute further states that "[f]or all examinations after the first, the employer shall pay the reasonable traveling expenses and loss of wages incurred by the employee in order to submit to such examination."[7] Neither party refers to this statute.

18. The Board's denying Deery's mileage and parking bill to attend Dr. Rieger's medical examination was not an abuse of discretion. As the Board's decision states, Dr. Rieger "only evaluated [Deery] once, albiet for two hours." The Board properly decided that Deery was not entitled to the mileage and parking costs associated with her initial medical examination.

19. Second, Deery contends that she was entitled to medical expenses from AstraZeneca for "prescriptions for Tequin, Adderall, Maxalt[,] Allegra, Celebrex, Sonata, Wellbutrin, Effexor, and Alprazolam[.]" The Board, however, found that the "testimony does not appear to support the documents that are included in the medical expenses, consisting of prescription[s] . . . . Finding none, the Board must deny payment of the medical expenses as submitted."

20. "In order for an employee to claim medical expenses incident to an award of compensation benefits [s]he must present evidence that (a) [s]he has

[7] 19 *Del. C.* § 2343; *see also Van Pelt v. Beebe Med. Ctr.*, 2004 WL 2154290, at *2 (Del. Supr. Sept. 20, 2004).

incurred medical expenses, (b) such expenses are attributable to a work-related injury and (c) the employer has not paid such expenses as required by 19 *Del. C.* § 2322."[8] "However, it does not follow that presentation of medical bills, by themselves, satisfy the Claimant's burden[.] . . . A connection between the condition treated by the physician and the Claimant's compensable accident, as per (b) above must be established."[9]

21. Deery claims that AstraZeneca is liable for Adderall® prescription costs. Adderall® treats Attention Deficit Hyperactivity Disorder.[10] Deery's and the medical experts' testimony makes clear that Deery was diagnosed with attention deficit disorder before her psychological injury. As presented above, Dr. Milic testified, "[ADD] is chronic. It is when you were born, [it is] from when you were born." Because Deery had ADD before the injury, and does not allege that working at AstraZeneca caused her ADD, the Board properly found that AstraZeneca was not responsible for the Adderall® costs.

22. The same is true for the Allegra® and Tequin®. Allegra® relieves

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[8] *Guy J. Johnson Transp. Co. v. Dunkle*, 541 A.2d 551, 553 (Del. 1988).

[9] *West v. Wal-Mart, Inc.*, 2006 WL 1148759, at *5 (Del. Super. Mar. 31, 2006) (Stokes, J.) (holding that "[i]f the Board rejects the medical expenses, it must explain it[s] reasoning for the rejection. . . . The record is clear that some of the medical expenses are related to the treatment of the . . . work accident.").

[10] *Physicians' Desk Reference* 3013 (63d ed. 2009).

symptoms associated with seasonal allergic rhinitis, and Tequin® is an antibiotic used to treat bacterial infections.[11] No medical expert testified about Allegra® or Tequin®, and it is not apparent how these costs would relate to Deery's psychological injuries. Accordingly, Deery has not shown that the Board abused its discretion in denying Deery's medical expenses for allergy pills and antibiotics.

23. There was, however, testimony about some of the prescriptions. Dr. Corso testified that Deery was prescribed Zelnorm®. Dr. Milic testified about Deery's prescriptions for Effexor®, Wellbutrin®, Xanax®, Sonata®, and Klonopin®. Annas testified that Deery was prescribed Effexor®, Xanax®, Sonata®, Wellbutrin®, Lamictal®, and Cymbalta®.

24. Dr. Milic testified that "the treatment that [he] administered to [Deery] was . . . treatment reasonable, necessary and related to the psychiatric, psychological injury[.]" Dr. Milic, however, by his own admission, cannot prescribe medications, as he is a psychologist, not a psychiatrist. The medications were prescribed by Deery's other doctors. Furthermore, Annas agreed "that all of her opinions have been based on reasonable psychiatric probability." The experts did not, however, testify as to the reasonableness of the prescriptions and whether they were related to Deery's psychological injury.

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[11] *Id.* at 2684.

25. While it would have been useful for the Board to explain its reasons for denying each medical expense, the Board's conclusion that the testimony did not adequately support the expenses seems consistent with the record. The testimony presented does not establish that the prescriptions were necessary and related to Deery's work injury, but merely is descriptive of medications that Deery had been prescribed over several years.

26. Next, Deery contends that the Board "improperly limited the award of attorneys' fees when it determined that Claimant was only entitled to thirty percent of the monetary award and failed to consider Claimant's non-monetary benefit of compensability." Deery asserts that "the Board customarily awards fees in the range of $260.00 to $325.00 per hour for counsel experienced in the handling of workers' compensation cases[,]" but that the Board awarded a rate of $63 per hour. Deery claims that "[t]hirty-percent of the monetary award . . . is unreasonably low. . . . Intangible, nonmonetary benefits are the proper basis for an award of attorneys' fees."

27. Deery's contentions have been addressed recently in *Mitchell v. Purdue, Inc.*[12] In *Mitchell*, claimant argued that "the Board erred as a matter of law

[12]2009 WL 1418127 (Del. Supr. May 21, 2009). Notably, Deery's counsel was counsel for appellant in *Mitchell*, and made almost identical arguments there. Deery's counsel, however, did not mention *Mitchell* here. *See* Del. Lawyers' Rules of Prof'l Conduct R. 3.3(a)(2) ("A

by limiting its award of attorneys' fees to 30% of the monetary award[,]" and that "the Board should have considered the non-monetary benefits secured by counsel, resulting in an award disproportionately low in relation to the time spent and the results achieved."[13] Claimant further argued that "when the Board is not constrained by the maximum fee limit in Section 2320(10), it customarily awards fees in the range of $260 to $325 per hour for experienced counsel[,]" but that the "Board's award amounted to only $80 per hour."[14]

28. *Mitchell* holds that "non-monetary benefits 'do not automatically translate into an additional sum beyond the amount determined by reference to the monetary award.' Accordingly, while the Board is *permitted* to consider the non-monetary benefits gained for the claimant by counsel, the Board is not *required* to do so in its fee calculation."[15] *Mitchell* further holds:

> A review of the Board's decision here discloses that the Board thoroughly and adequately addressed the Cox factors. The Board concluded that Mitchell was entitled to attorneys' fees amounting to the lesser of 30% of the total award, or $5,750. The Board expressly found such an

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lawyer shall not knowingly: fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel[.]").

[13] *Mitchell*, 2009 WL 1418127, at *2.

[14] *Id.* at *3; *see also* 19 *Del. C.* § 2320(10).

[15] *Mitchell*, 2009 WL 1418127, at *2.

> award was reasonable, given Mitchell's counsel's level of experience and the nature of the legal task[.][16]

29. Although Deery contends that "this Court cannot determine how the Board reached its conclusion with regard to the appropriate attorneys' fees in this case," the Board expressly considered the *Cox* factors:

> In determining an appropriate attorney's fee, the Board considered the following factors: (1) The time, novelty and difficulty of the issues; (2) The preclusion of other employment by the lawyer; (3) The fees customarily charged; (4) The amount involved and results obtained; (5) The time limitations; (6) The nature and the length of attorney/client relationship; (7) The experience of the lawyer; (8) The fee's contingency; (9) The employer's ability to pay; and (10) Payment of fees and expenses from another source.
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> Claimant's counsel submitted an affidavit indicating that he spent approximately 40 hours preparing for this hearing, which lasted almost two days. The issues in this case were not particularly novel or difficult. Counsel was not precluded from accepting other employment because of this case, although he could not work on other cases at the same time he was working on this case. Counsel noted 39 years of practice with most in the area of workers' compensation. He seeks contingency fee of 30%, and he does not expect any other fee. He did not indicate his hourly rate, but the Board had found a fee of $250 for an experienced attorney practicing in workers' compensation to be reasonable. Counsel's affidavit does not indicate when representation began. There was no evidence presented that AstraZeneca is unable to pay an award of

[16] *Id.*

attorney's fee.

30. After considering the *Cox* factors, the Board concluded that "a fee of $10,000 (40 x $250) or thirty percent (30%) of the award, whichever is less, is reasonable." As *Mitchell* makes clear, the Board may consider claimant's non-monetary benefits, but is not required to do so in calculating attorneys' fees. "[T]he record need only show that the Board *considered* the *Cox* factors in reaching its decision with respect to attorney's fees."[17] Accordingly, although the court recognizes the impressive result obtained by Deery's counsel, it cannot call the Board's decision to award thirty percent an abuse of discretion.

For the foregoing reasons, the Board's decision is **AFFIRMED.**

IT IS SO ORDERED.

Judge

cc: Prothonotary (civil)
Walt F. Schmittinger, Esquire
Christian G. McGarry, Esquire
Christopher Baum, Esquire

[17] *Lofland v. Econo Lodge*, 2009 WL 3290450, at *4 (Del. Super. Aug. 31, 2009) (Vaughn, P.J.) (citing *Day & Zimmerman Sec. v. Simmons*, 965 A.2d 652, 659 (Del. 2008) ("The *Cox* factors are guidelines, not mandatory rules[.]")). Deery's counsel also failed to mention *Lofland*, but he represented appellant in that case as well.